85-1191

No.

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PAINTERS LOCAL UNION NO. 164 OF THE BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AND TRUSTEES OF THE PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA LOCAL NO. 164 HEALTH & WELFARE PLAN,

Petitioners,

v.

JAMES L. EPLEY, an individual and doing business as EPLEY COATINGS and HISCO CONSTRUCTION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED

1. May a construction industry employer avoid the financial obligations of breach of contract by oral repudiation of the collective bargaining agreement after the union discovers that the agreement has been breached?

2. May a collective bargaining agreement in the construction industry, which provides for written notice of intention to terminate or to modify, be repudiated by refusal to honor its terms, or must such repudiation be in writing?

3. Under what conditions may a party to a collective bargaining agreement be prevented from repudiating that agreement?

PARTIES TO THE PROCEEDINGS

Petitioners, the TRUSTEES OF THE PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA LOCAL NO. 164 HEALTH & WELFARE PLAN, and PAINTERS LOCAL UNION NO. 164 OF THE INTERNATIONAL BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on July 12, 1985. Respondent is JAMES L. EPLEY, an individual, doing business as EPLEY COATINGS and HISCO CONSTRUCTION. There were no other parties below.

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IN THE

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OCTOBER TERM, 1985

No.

PAINTERS LOCAL UNION NO. 164 OF THE BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AND TRUSTEES OF THE PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA LOCAL NO. 164 HEALTH & WELFARE PLAN,

Petitioners,

v.

JAMES L. EPLEY, an individual and doing business as EPLEY COATINGS and HISCO CONSTRUCTION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CITATION OF OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit has been reported at 764 F.2d 1509 (11th Cir. 1985) and is included within the Appendix to this Petition, commencing at page 1a. The Opinion and Order of the United States District Court for the Middle District of Florida, determining that the collective bargaining agreement was enforceable, and that the decision of the Joint Trade Board should be enforced has not been generally reported, but appears in the Appendix commencing at page 12a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 12, 1985. A Petition For Rehearing and Rehearing En Banc by Petitioners was denied by the Court of Appeals on September 17, 1985. App. 10a-11a. On December 6, 1985, Justice Powell extended the time in which to petition for certiorari to and including January 15, 1986. App. 28a. This Court has jurisdiction pursuant to 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(f) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(f) provides in pertinent part as follows:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or . . . *Provided further*: That any agreement which would be invalid, but for (1) of this subsection shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, provides in pertinent part as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this

chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Statement of Facts

This action was commenced by the Trustees of the Painters Local 164 Health & Welfare Plan and by Painters Local 164 ("the Union"), petitioners herein, under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 ("LMRA"), to enforce an award that a Joint Trade Board had entered against respondent James L. Epley to remedy Epley's breach of his contract with the Union. The court below held that Epley had lawfully repudiated that contract and was not liable for the breach. The facts giving rise to this controversy, as found by the lower courts, are as follows.

In the latter part of 1975, Epley, doing business as Epley Coatings, a sole proprietorship, submitted a bid on a painting subcontract for a construction project at Blount Island in Jacksonville, Florida. Under the terms of the project agreement for that project—a lawful agreement under § 8(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(e) ("NLRA")—subcontracts were to be awarded only to unionized subcontractors; in order to qualify for the subcontract, Epley signed the standard painters agreement which the Union earlier had negotiated with the Jacksonville Chapter of the Painting & Decorating Contractors of America ("PDCA"). At the time Epley signed that contract, he did not have any employees.

After being awarded the subcontract, Epley, pursuant to his agreement with the Union, sought employees through the Union's hiring hall, and the Union referred

employees to Epley as needed. Most of the persons referred were members of the union; those who were not voluntarily signed slips authorizing the Union to serve as their bargaining representative.

On May 1, 1976, the collective bargaining agreement between the Union and PDCA, to which Epley had become a party, expired. Because negotiations for a successor agreement between the Union and PDCA had not concluded, Epley and the Union signed a new agreement, effective May 1, 1976, under which Epley agreed to become a signatory to the new PDCA agreement once it was executed. That latter agreement became effective June 1, 1976 and ran through June 16, 1978.[1]

Like its predecessor, the 1976 agreement between the Union and the PDCA, to which Epley was bound, contained a provision obligating signatory employers to use the Union's hiring hall to fill their manpower needs. The agreement also contained a provision under which each employer was prohibited from "us[ing] any corporate or other operating device for the purpose of violating his obligations under this agreement."

Notwithstanding these provisions, in April or May of 1978 Epley formed Hisco Construction, another sole proprietorship, to do painting work in Jacksonville on a nonunion basis. Epley caused both of his businesses to bid on a subcontract from Tuttle-White Contractors, Inc., to do painting work for a school in Jacksonville that Tuttle-White was building; Epley/HISCO underbid Epley Coatings and was awarded the subcontract. Epley/Hisco began work on that project in May of 1978 on a nonunion basis; Epley hired employees without seeking re-

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[1] Epley refused to formally execute the 1976 PDCA agreement, but the courts below concluded that Epley was nonetheless bound by it as the result of the May 1, 1976 agreement he had signed.

ferrals from the Union's hiring hall, and Epley did not pay the fringe benefits required by his agreement with the Union. At the time these events took place, the 1976 PDCA agreement was still in effect, Epley continued to perform work under that agreement on the Blount Island project, and all of Epley's employees on that project either were members of the Union or had designated it to be their bargaining representative.

In May, 1978, *after* Epley/Hisco had begun work on the Tuttle-White contract, the Union discovered that Epley had established Hisco, had underbid his own firm, and was working non-union. The union's business manager confronted Epley and was told that Epley was not going to use union labor at Tuttle-White. At no time did Epley submit "written notice to all other parties" of his decision to terminate his contract with the Union even though such written notice was required by the terms of that contract.

On May 11, 1978, the Union filed a grievance against Epley under the grievance procedure of the PDCA collective bargaining agreement to which Epley was bound; that grievance alleged that Epley had breached the contract by establishing Hisco to circumvent his obligations under the contract. On May 24, 1978, the Joint Trade Board established under the contract, consisting of three persons selected by the PDCA contractors and three selected by the Union, held a hearing after which that Board issued a written decision finding that "The operation by James L. Epley of Hisco Painting Contracting Company violates the contract as charged." To remedy that violation, the Joint Board concluded that Epley should be required, *inter alia*, to pay the Health & Welfare Plan the contribution required by the PDCA contract for each hour worked by Epley's employees on the Tuttle-White project. The Joint Board requested the Trustees of the Plan to conduct an audit to determine the precise amount due under its award.

Epley refused to permit the audit provided for by the Joint Board. Accordingly, the Trustees and the Union commenced this action to enforce the Joint Board's award.

The Court of Appeals' Decision

The court below refused to enforce the Joint Board award or otherwise to hold Epley liable for his breach of the PDCA contract. That court concluded that the original agreement between Epley and the Union was a prehire agreement under § 8(f) of the NLRA; the 1976 agreement was "only a successive prehire agreement, not a full-fledged collective bargaining agreement"; Epley "had the clear right to repudiate or avoid the areawide prehire agreement as to projects not yet begun or projects under way, where the union had failed to establish its majority status," and that in his conversation with the Union business agent, Epley "informed the union that he was repudiating the prehire agreement insofar as it might apply to the Tuttle-White job." App. 5a, 9a. On that basis the court of appeals reversed the district court's judgment which had sustained the Joint Board's award.

REASONS FOR GRANTING THE WRIT

A. Introduction.

This case raises important issues concerning both the manner of repudiating a collective bargaining agreement in the construction industry, and also the effect of such repudiation on breaches of the agreement occurring prior to the time of repudiation. Since this Court's decision in *NLRB v. Local 103 International Association of Bridge Workers (Higdon)*, 434 U.S. 335, 98 S.Ct. 651, 54 L.Ed.2d 586 (1978) there has been much litigation in the lower courts concerning the manner and method of repudiation of a collective bargaining agreement. In *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 103 S.Ct. 1753, 75 L.Ed.2d 830 (1983) this Court resolved some of those

questions, but declined to decide what specific acts would be required to effect repudiation, and also declined to decide under what circumstances there might be equitable reasons for preventing a party from exercising an option to repudiate the agreement. Several Courts of Appeals have undertaken to answer those questions, in a manner which we feel is consistent with this Court's decisions. The Eleventh Circuit panel, in the case below, took a different course, which we believe requires correction.

Furthermore, the decision of the Court of Appeals greatly expands the effect of an employer's repudiation of a prehire agreement, permitting it to abrogate any responsibility for violations of the contract which occurred prior to repudiation simply because the measure of damages parallels the labor costs the employer would have incurred had it not repudiated the contracts. The Court of Appeals either overlooked or failed to appreciate the significant distinction between enforcement of a collective bargaining agreement in all of its terms, including the obligation to extend recognition and to bargain with the Union, and the simple exaction of monetary penalties against an employer for violation of an express provision of his contract. In doing so, the court departed from established precedent of this Court, including *Walsh v. Schlect*, 429 U.S. 401, 97 L.Ed.2d 679, 50 L.Ed.2d 641 (1977) and *Howard Johnson Company v. Hotel Employees*, 417 U.S. 249, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974).

Accordingly, this Court should review the decision of the Eleventh Circuit and, upon review, reverse that decision.

B. The Eleventh Circuit's Decision Permits a Construction Industry Employer Who Has Been Caught in a Breach of the Collective Bargaining Agreement to Avoid the Financial Responsibility for That Breach by Claiming That the Agreement Has Been Repudiated, After the Breach Has Been Discovered.

In order to avoid the obligations of the collective bargaining agreement, EPLEY decided to set up a non-union company, called HISCO. He bid the Tuttle-White project under both EPLEY COATINGS, his union company, and HISCO, a company which then existed only on paper. The HISCO bid was accepted, and EPLEY began making plans to work on that project. The District Court expressly found that EPLEY had done this. It was only several weeks later, when he was discovered to be working on the Tuttle-White project "non-union" that he was confronted by the union business agent, and the discussion as to his future intentions occurred. EPLEY did not "clearly" repudiate the contract, but simply said he did not intend to "be union anymore," or that he was "going non-union."

Pursuant to the terms of the collective bargaining agreement, which both the District Court and the Court of Appeals found to be applicable, the union presented the matter to the Joint Trade Board, to determine whether EPLEY had violated the provisions of the agreement which precluded using "a corporate or other operating device" to avoid his obligations under the contract. The Board found that he had. The remedy selected by the Board was in the nature of "having the punishment fit the crime." EPLEY was required to pay an amount equal to the fringe benefits that would have been paid on the Tuttle-White job had he performed it with the union company.

EPLEY COATINGS did not have the contract to do the Tuttle-White job, HISCO did, so that "repudiation"

by EPLEY was ineffective.[2] Had EPLEY COATINGS performed the work on the Tuttle-White project, and attempted to repudiate the union contract prior to beginning it, his argument would be substantially different. Here, however, the union employer was assessed contractual damages measured by the work performed by the company that he set up in order to avoid his obligations under the union contract. There was nothing in the Joint Trade Board decision which infringed upon Section 7 rights of HISCO employees, or interfered with the labor relations policies of the non-union company. The remedy was directed solely to the wrongdoer, and simply selected the Tuttle-White project as the appropriate measure of damage.

The breach plainly occurred when HISCO was established, and allowed to underbid the union company on the Tuttle-White project. Since the harm occurred prior to the "repudiation," the decision of the Joint Trade Board was plainly enforceable. As this Court made clear in *McNeff*, *supra*, trustees of fringe benefit funds may lawfully enforce the monetary obligations of even a voidable prehire agreement, until the agreement is repudiated. It is well settled that the provisions of a collective bargaining agreement giving rise to an arbitration clause are enforceable, even after the contract has expired, to address issues which arose prior to expiration. *John Wiley & Sons v. Livingston*, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964); *Nolde Bros. Inc. v. Local 358, Bakery Workers*, 430 U.S. 243, 97 S.Ct. 1067, 51 L.Ed.2d 300 (1977). It is plain that the Joint Trade Board could consider whether EPLEY, by establishing HISCO in April, and underbidding and commencing work on the Tuttle-White project in May, *prior to any discussion or conversation with the union*, had violated the provisions of the

[2] Unless HISCO was the "alter-ego" of EPLEY, an issue not presented to or decided by either court below.

contract precluding the use of "corporate or other operating device" to avoid its obligations.

EPLEY does not dispute that it violated the agreement. Indeed, it urged admission of its violation as support for its claim of repudiation. The court below, however, found that the wrongdoer should not be permitted to profit from the wrong, and a breach of the agreement could not be used as evidence of lack of majority status, or by inference, repudiation. The Joint Trade Board properly determined the violation to have occurred and selected as a remedy an amount equal to fringe benefits contributions that would have been required had the job been performed under the union contract. *Walsh v. Schlect, supra.* This is not an action to enforce or apply *all* of the terms of the collective bargaining agreement, or to extend recognition, or to enhance representation rights of the union. It is simply an action against one company, which is required to pay damages for breach of its agreement because of the establishment of the second company.

Had the contract been repudiated *before* the establishment of the second company, at a time when EPLEY was in full compliance with the agreement, a much different question would be presented. Here, however, he simply chose to violate the agreement, and when that violation was discovered to admit that he had been caught. EPLEY did not at any time testify that he was motivated by a lack of, or a concern for a lack of, majority support for the union but simply by a desire to get out from under the obligations of the union contract. The decision of the Eleventh Circuit permits him to do so, despite the fact that he chose to breach his contract in order to do so.

C. The Decision of the Eleventh Circuit Panel Permits an Employer to Claim Repudiation of a Collective Bargaining Agreement Simply by Admitting That He Has Been Caught in a Violation of It.

The only evidence in support of EPLEY's claim that he repudiated his collective bargaining agreement was the

conversation that he had with the union business agent, after discovery of the establishment of the non-union company in violation of the contract. At that time EPLEY simply announced that he did not intend to be union anymore. Although the collective bargaining agreement had elaborate procedures for furnishing written notice of intention to terminate or modify provisions of the contract, EPLEY made no attempt to comply with any these. The Eleventh Circuit Panel Decision simply referred to the testimony noted, and stated that EPLEY "repudiated the pre-hire agreement in May of 1978."

In *Jim McNeff, Inc. v. Todd, supra*, this Court did not find it necessary to determine what was required in order to repudiate a written collective bargaining agreement. Other Courts of Appeal, however, have indicated that something more than mere noncompliance is required. Courts have placed the burden of proof on the party seeking to repudiate, and have required clear evidence. *Local 103 v. Higdon Construction Co., Inc.*, —— F.2d ——, 116 LRRM 3265 (7th Cir. 1984).

In *Jim McNeff, supra*, this Court observed simply that the agreement had not been repudiated. Earlier, the Court of Appeals in *McNeff* specifically considered the employer's evidence in support of repudiation and found it inadequate, because the employer said nothing, but merely refused to comply with the agreement. *Todd v. Jim McNeff, Inc.*, 667 F.2d 800 (9th Cir. 1982). Other Circuits have addressed this problem and most require substantial specific action by the employer. Since the employer is attempting to avoid his obligations under a legal instrument, which contains specific requirements for termination or cancellation, it is not unreasonable to require the repudiation to have equal dignity with that of the agreement itself. *Carpenters v. Mayhew Co.*, 664 F.2d 215 (10th Cir. 1981). A collective bargaining agreement cannot be *changed* except in writing, *Mo-Kan Teamsters Pension Fund v. Creason*, 716 F.2d 772 (10th Cir.

1983), relying on the "elaborate protection system" in 29 U.S.C. Sec. 186. If the employer may not reduce the rate or coverage of fringe benefit obligations except by written agreement, it seems illogical to permit vague oral statements to *cancel* those same obligations.

Because repudiation of the agreement has such potentially broad consequences, and since enforcement may be sought by one not specifically a party to it (such as trustees of fringe benefits funds) it would not seem unduly burdensome to require the notice of repudiation to be in writing. Other statutes require unions or employers to give written notice of intention to terminate, of intention to commence collective bargaining negotiations, or to engage in picketing. We see nothing onerous about requiring written notice of intention to avoid obligations under a collective bargaining agreement. Such notice would permit the Union to attempt to demonstrate majority support, seek to organize the project, or to take other lawful action. We see no purpose, consistent with the federal labor policy, to permit an employer to "ambush" an unsuspecting union."

If written notice is not required, courts will be forced to resolve endless disputes over whether an employer "manifested an intention" to terminate an agreement, what was said, whether it was limited to a particular jobsite, etc. While courts are certainly competent to referee these issues, the policies in favor of enforcement of collective bargaining agreements, particularly where enforcement is sought by fringe benefit funds, argue strongly against requiring all such disputes to be resolved by a U.S. District Court. If notice were required to be in writing, these disputes, if not eliminated, at least would have one particularly troublesome factual issue removed.

In the instant case, the Panel decision does not indicate what EPLEY did in order to effect repudiation, and accordingly offers no guidelines whatsoever to a District

Court, or to other parties, in resolving similar issues. Persons unfamiliar with the facts of the case, or the evidence presented, will argue this way and that to various District Courts, or Courts of Appeals, with no real enlightenment whatsoever. This is an issue which the Court previously avoided as unnecessary in *McNeff*, but which we respectfully suggest is now appropriate for decision.

D. In the Circumstances of This Case, EPLEY Should Not Have Been Permitted to Repudiate the Agreement.

In *McNeff*, *supra*, this Court indicated that there might be circumstances in which a court might prevent a party from exercising its option to repudiate the agreement. We suggest that such considerations may well be relevant here. As the District Court observed, the evidence of repudiation was slim, and in fact was more properly considered as evidence of the breach of the agreement. Plainly, EPLEY was attempting to have the benefit of his union contract, but was unwilling to be "up front" about his intention to avoid his obligations. There is a specific contractual provision in the agreement in which he promises not to establish another company for the purpose of avoiding his obligations, and the collectively bargained dispute resolution body determined that he breached that promise. This case does not involve an attempt to enforce all of the obligations of the agreement, or even to undo the "repudiation", but simply to enforce a particular bargain, that EPLEY would not establish a company for the purpose of avoiding his obligations. Under these circumstances, we respectfully suggest it would be appropriate for the Court to decline, as the District Court did, to recognize the employer's efforts to "repudiate" and thereby escape the penalty for his admitted contract violation.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment of the Court of Appeals for the Eleventh Circuit in this case.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH DISTRICT

No. 84-3183

PAINTERS LOCAL UNION NO. 164 OF THE BROTHERHOOD OF PAINTERS, *et al.*,
Plaintiffs-Appellees,

v.

JAMES L. EPLEY, ETC.,
Defendant-Appellant.

July 12, 1985

Appeal from the United States District Court
for the Middle District of Florida

Before RONEY and CLARK, Circuit Judges, and SIMPSON, Senior Circuit Judge.

CLARK, Circuit Judge:

This appeal stems from a dispute over the scope and duration of a § 8(f) union-employer prehire agreement, the application of such an agreement to a project by project employer, and the effect of an employer's repudiation of the prehire agreement. The district court order enforced the decision of a joint trade board and awarded

Painters Local Union No. 164 (Local 164) a sum of $30,040.29 plus interest for fringe benefits, audit fees, and attorney's fees and costs. Suit was brought by Local 164 against James L. Epley, individually, and doing business as Epley Coatings and as Hisco Construction, pursuant to 29 U.S.C. § 185 and § 301 of the National Labor Relations Act (NLRA). The district court correctly defined the issue as one of "ascertaining whether the arbitrator was acting pursuant to [a] valid and existing agreement."

The district court filed an opinion on February 25, 1981, in which the court concluded, "[t]he parties' initial agreement, as a § 8(f) prehire agreement, was transformed into a collective bargaining agreement when the parties entered into their second agreement on or about May 1, 1976, the effective date of the agreement." Before entry of judgment on January 23, 1984, the appellant Epley urged the district court to reconsider its previous opinion and determination of liability in light of *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 103 S.Ct. 1753, 75 L.Ed.2d 830 (1983). In *McNeff* the Supreme Court implemented its previous opinion in *Higdon*, *infra*, and said the following:

> We did not decide in *Higdon* whether prehire agreements are enforceable in a § 301 action. There is a critical distinction between an employer's obligation under the Act to bargain with the representative of the majority of its employees and its duty to satisfy lawful contractual obligations that accrued after it enters a prehire contract. Only the former obligation was treated in *Higdon*.

103 S.Ct. at 1757 (footnote omitted). In finding prehire agreements enforceable in § 301 actions the Court limited its holding as follows:

> A § 8(f) prehire agreement is subject to repudiation until the union establishes majority status.

> However, the monetary obligations assumed by an employer under a prehire contract may be recovered in a § 301 action brought by a union prior to the repudiation of the contract, even though the union has not attained majority support in the relevant unit. There having been no repudiation in this case, the judgment of the Court of Appeals is [affirmed].[1]

103 S.Ct. at 1759. We conclude that the district court erred, that the evidence demonstrates that Epley repudiated the prehire agreement in May of 1978, and that Epley was not obligated to pay any fringe benefits thereafter to the union except on the project for which the original prehire agreement was entered.

I. FACTUAL BACKGROUND

In the latter part of 1975 Epley, d/b/a Epley Coatings, made a bid on painting work for a construction project at Blount Island in Jacksonville, Florida. All subcontractors who performed work at Blount Island were required to sign local union working agreements in order to perform work for the general contractor at Blount Island.

Epley, d/b/a Epley Coatings, was awarded the job and pursuant to the terms of the project agreement, signed a working agreement with Local 164 which had an effective date of May 1, 1974, and was due to expire in 1976. Epley began its painting subcontracting work at Blount Island during December, 1975, and obtained employees directly from the Local 164 hiring hall to perform the work.

Local 164 also had a working agreement with the Painting and Decorating Contractors of America

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[1] This court's prior ruling in *Laborers District Council v. McDowell Contractors, Inc.*, 680 F.2d 94 (11th Cir. 1982), was overruled by the Supreme Court to the extent it held that absent majority status the monetary obligations assumed by an employer under a prehire agreement could not be enforced.

(PDCA), of which Epley was not a member. This agreement expired during 1976 and Local 164 entered into negotiations with PDCA for a new agreement. While these negotiations were going on Local 164 executed interim agreements with contractors who were not members of, nor had assigned bargaining rights to, the PDCA. Local 164 and Epley entered into an interim agreement on May 1, 1976, representing the second agreement between the two parties. By the terms of this interim agreement, Epley agreed to become a signatory to the PDCA agreement being negotiated, if and when it was executed. Local 164 and the PDCA subsequently reached an agreement with an effective date of June 1, 1976, and an expiration date of June 16, 1978. Though Epley refused to sign that agreement [2] he continued to use union supplied labor and paid the PDCA negotiated wages and fringe benefits for work performed on the Blount Island project.

Epley thereafter in April or May, 1978, formed Hisco Construction, a sole proprietorship, and entered a subcontract agreement with Tuttle-White Constructors, Inc. (Tuttle-White), the general contractor at the Westside Skills Center School for the Duval County School Board in Jacksonville. Tuttle-White had accepted Epley's non-union bid and Hisco Construction began working on the project in May of 1978 on a non-union basis. Hisco Construction did not request employees from the Local 164 hiring hall, nor did it pay any fringe benefit contributions on behalf of its painting employees working on the Tuttle-White job to any of the funds established by Local 164, or in which Local 164 participated. It did continue to pay fringe benefits to the union for employees working on the Blount Island project. The fringe benefits at issue in this case relate solely to Hisco's employees on the Tuttle-White job.

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[2] The district court found, and we agree, that although Epley did not sign the PDCA agreement he was bound to its terms by virtue of the May 1, 1976 agreement.

In May of 1978, a confrontation occurred between the union and Epley/Hisco because the Tuttle-White job was being conducted with non-union employees. The union established a picket line at the job and it is clear from the record that Epley told the union that he was not going to use union labor at Tuttle-White. The exact date is unclear but it is certain that in May of 1978 Epley informed the union that he was repudiating the prehire agreement insofar as it might apply to the Tuttle-White job (*See* T. 49, 53-54 as to testimony of the union's business agent and T. 86, *et seq.* as to Epley's testimony).

In May of 1978, the union brought charges against Epley before the joint trade board alleging that he had violated Article II(D) of the 1976 PDCA agreement.[3] The two previous agreements Epley actually signed contained the same language.

The joint trade board found that the use by Epley of Hisco Construction as a non-union employer on the Tuttle-White project violated the agreement between the parties. The trade board ordered that an audit be conducted to determine if fringe benefits were due for the hours worked by Hisco employees. Epley refused to comply with the audit request and this suit followed.

II. THE DISTRICT COURT'S RULINGS

The district court upheld the award by the joint trade board finding that the initial § 8(f) prehire agreement was transformed into a collective bargaining agreement when Epley and Local 164 entered into the second agreement on May 1, 1976. This ruling was based upon a factual finding that the six months preceding the May 1, 1976, agreement, when Epley was working at Blount

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[3] Article II(D) provides in relevant part:

> Employer party hereto shall not use any corporate or other operating device for the purpose of violating his obligations under this agreement....

Island, served as tacit support for the designation of Local 164 by the employees as their collective bargaining representative. This finding stemmed from evidence adduced at trial that on the Blount Island project Epley had hired exclusively from the Local 164 hiring hall, with most of the employees being union members and non-union members having signed authorization slips. The court found that there was sufficient time for the employees to voice their opposition to Local 164 or to voice their support for another bargaining representative, but no evidence was presented to that effect. Accordingly, the court held that the parties' second agreement was a valid collective bargaining agreement with a rebuttable presumption of majority representation by Local 164.

III. THE ISSUES ON APPEAL

On appeal Epley raises three issues: (1) whether the initial agreement between Epley and Local 164 was transformed into a collective bargaining agreement when the parties entered into their second agreement on May 1, 1976; (2) whether a § 8(f) prehire agreement is only voidable during its term when it is the initial contract between the parties; and (3) whether Epley could be bound by the terms of the second agreement on the Tuttle-White project when the union had failed to establish its majority status at that job site. We find that the district court's opinion is contrary to *NLRB v. Local 103, International Association of Bridge Workers (Higdon)*, 434 U.S. 335, 98 S.Ct. 651, 54 L.Ed.2d 586 (1978); *NLRB v. Haberman Construction Co.*, 641 F.2d 351 (5th Cir. 1981) (en banc); and *McNeff, supra,* and accordingly reverse.

Prehire agreements under § 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f), exempt construction industry employers and unions from the general rule precluding a union and employer from signing "a collective-bargaining agreement recognizing the union as the

exclusive bargaining representative when in fact only a minority of the employees have authorized the union to represent their interests." *Higdon*, 434 U.S. at 344, 98 S.Ct. at 657.

Section 8(f) provides in pertinent part:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement. . . . Provided . . . That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

Section 8(f) permits construction industry employers and unions to reach agreements setting the terms and conditions of employment without the union's majority status first having been established as required by § 9 of the Act. One important factor considered by Congress in enacting § 8(f) was the temporary and transitory nature of employment in the construction industry. *See McNeff*, 103 S.Ct. at 1756. Congress enacted § 8(f) in recognition of the fact that unions in the construction industry would often be unable to establish majority support with respect to many bargaining units. *See* S.Rep. No. 187, 86th Cong., 1st Sess. 55-56 (1959), 1 Leg.Hist. 541-42, U.S. Code Cong. & Ad. News 1959, 2318. As for employers in the construction industry Congress recognized the need of the employer to know his labor costs in order to properly estimate a bid and the necessity of

having an available supply of skilled labor for quick referral. *See* H.R.Rep. No. 741, 86th Cong., 1st Sess. 19 (1959), 1 Leg.Hist. 777, U.S.Code Cong. & Ad.News 1959, 2318. *See generally, Higdon, supra,* 434 U.S. at 348-49, 98 S.Ct. at 659.

In *Higdon,* the Supreme Court held that § 8(f) does not authorize picketing to enforce prehire contracts where the union has failed to establish majority status. *Higdon,* 434 U.S. at 346, 98 S.Ct. at 658. The facts in *Higdon* show that Higdon Construction Company reached a prehire agreement with the union on July 31, 1973, obliging Higdon to abide by the terms of the multi-employer understanding between Local 103 and the Tri-State Iron Workers Employers Association, Inc. At about that same time Higdon Contracting Company was formed to carry on construction work with non-union labor and undertook contracts in Kentucky and Indiana. The union picketed both job sites, one for more than 30 days without seeking a majority representation election at either site. The Local had not represented a majority of the employees at either of these sites. The Court held that § 8(f) does not "expand the duty of an employer under § 8(a)(5), which is to bargain with a *majority* representative, to require the employer to bargain with a union with which he has executed a prehire agreement but which has failed to win majority support in the covered unit." *Id.* (emphasis in original).

Our reading of *Higdon, supra,* decided in 1978, *Haberman, supra* (en banc) decided in 1981, and *McNeff, supra,* decided in 1983 leads us to conclude that an employer who enters into an area-wide prehire agreement with a union is liable to the union under the terms of the contract for all work done by the employer on any job site within the area, unless the contract is limited to a particular job site. However, the employer retains the right to repudiate the prehire contract at any time, except where the union has established majority status

at a particular project within the area covered by the contract. Here, Epley entered into a general PDCA contract without limitation to a particular job. *Higdon* mandates that such a prehire agreement is *voidable* by the employer and that such an agreement does not become a collective bargaining contract unless the union actually represents a majority of the employees in the relevant unit and is recognized as such by the employer. *Higdon*, 434 U.S. at 341, 98 S.Ct. at 655. *Haberman* makes the distinction between a "project by project" employer and an employer with a "stable work force." 641 F.2d at 367. It is clear from the record in this case that Epley was a "project by project" employer and we need not consider what our holding would be if Epley employed a stable work force.

Epley's principal contention on appeal is that the second agreement entered into between Epley and Local 164 on May 1, 1976, was only a successive prehire agreement, not a full-fledged collective bargaining agreement, and that pursuant to *Higdon* absent the union's establishment of majority status at the Tuttle-White site, Epley had no duty to honor or bargain under the § 8(f) agreement with respect to employees at that site.

The parties stipulated that the union did not represent a majority of the employees at the Tuttle-White job. Taking into consideration the holdings in *Higdon*, *Haberman*, and *McNeff*, *supra*, we conclude that Epley had the clear right to repudiate or avoid the area-wide prehire agreement as to projects not yet begun, or projects underway, where the union had failed to establish its majority status. Given the fact that the union did not represent a majority of the workers at the Tuttle-White project, and Epley's clear repudiation in May of 1978, we can only conclude that the district court erred in holding Epley liable for fringe benefits for work performed on the Tuttle-White site.

REVERSED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT.

No. 84-3183

PAINTERS LOCAL UNION NO. 164 OF THE BROTHERHOOD OF PAINTERS, *et al.*,
Plaintiffs-Appellees.

versus

JAMES L. EPLEY, ETC.,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 12, 1985, 11 Cir., 198—, —— F.2d ——).

(Filed Sept. 17, 1985)

Before RONEY and CLARK, Circuit Judges, and SIMPSON, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appel-

late Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas A. Clark
THOMAS A. CLARK
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 78-532-Civ-J-WC

PAINTERS LOCAL UNION NO. 164 OF THE BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA and TRUSTEES OF THE PAINTER, DECORATORS AND PAPERHANGERS OF AMERICA LOCAL NO. 164 HEALTH & WELFARE PLAN,

Plaintiffs,

vs.

JAMES L. EPLEY, an individual
and doing business as
EPLEY COATINGS AND HISCO,

Defendant.

[Filed Feb. 26, 1981]

OPINION AND ORDER

Plaintiffs, Painters Local Union No. 164 of the Brotherhood of Painters, Decorators and Paperhangers of America (hereafter referred to as the Union or Local 164) and the Trustees of the Painters, Decorators and Paperhangers of America Local No. 164 Health & Welfare Plan (hereafter referred to as Trustees) have brought suit against James L. Epley, individually, and doing business as Epley Coatings and as Hisco Construction for the enforcement of any award by a joint trade board rendered pursuant to a collective bargaining agreement, and for collection of

fringe benefit contributions, wages or other damages which may be due to the Plaintiffs or their members, and for the costs of the audit and reasonable attorneys fees. This suit was brought pursuant to 29 U.S.C. § 185, § 301 of the National Labor Relations Act, as amended (hereinafter referred to as either the Act or NLRA), and was tried before the Court without a jury. Plaintiff Local 164 is a labor organization within the meaning of 29 U.S.C. § 185; Plaintiff Trustees of Local 164's Health and Welfare Plan are trustees of fringe benefit funds created under Section 302 of the National Labor Relations Act, 29 U.S.C. § 186. James L. Epley d/b/a Epley Coatings, James L. Epley d/b/a Hisco Construction, and Hisco Construction Company, Inc., are employers engaged in the construction industry as painting contractors.

On April 3, 1972, a project agreement was entered into between the Northeast Florida Building and Construction Trades Council, other signatory local unions including Local 164, and the general contractor engaged to perform work for Offshore Power Systems in the manufacture of facilities for Westinghouse-Tenneco at Blount Island in Jacksonville, Florida. All subcontractors and various local trade unions working on the Blount Island project became signatories to this project agreement. During the latter part of 1975, defendant James L. Epley (hereinafter referred to as Epley) became a party to the project agreemnt for the Offshore Power Systems project at Blount Island. Epley formed Epley Coatings as a pole proprietorship to do painting subcontracting work in the construction industry.

Prior to commencing work at Blount Island, Epley d/b/a Epley Coatings signed a working agreement with Local 164 which had an effective date of May 1, 1974. Epley obtained employees directly from the Local 164 hiring hall to perform painting subcontracting work at Blount Island, and began work there during December, 1975.

During 1976, Local 164 was engaged in negotiations with the Painting & Decorating Contractors of America, Jacksonville Chapter (hereinafter referred to as PDCA) but was unable to reach an agreement with them prior to the stated expiration date of the contract between them. Accordingly, Local 164 entered into collective bargaining agreements with employers who were not members of the PDCA and who had not authorized the PDCA to bargain on their behalf. One such agreement was the second one entered into between Epley d/b/a Epley Coatings and Local 164 with an effective date of May 1, 1976. On or about June 21, 1976, Local 164 and the PDCA reached an agreement with an effective date of June 17, 1976. Epley refused to sign that agreement, but continued to use union supplied labor and pay the PDCA renegotiated wages and fringe benefits for work performed on the Blount Island project. During 1978 and through June, 1979, Local 164 had a dues check off procedure whereby individual union workers and authorized workers paid 2% of their gross earnings into the funds established by Local 164.

Epley, either doing business as Epley Coatings or Hisco Construction has never been a member of the PDCA and has never assigned any bargaining rights to that contractor's association. Neither Epley d/b/a Epley Coating nor Epley d/b/a Hisco Construction ever signed the working agreement made and entered into between Local 164 and the PDCA.

On or about April 11, 1978, Epley d/b/a Hisco Construction, a sole proprietorship, entered into an agreement with Tuttle-White Constructors, Inc., the general contractor engaged to build the Westside Skills Center School for the Duvall County School Board in Jacksonville. Epley had submitted bids for this job on both a union and non-union basis, and the non-union bid was accepted by the contractor. Hisco Construction began working on the Tuttle-White project in May of 1978 as a non-union job.

When Local 164 learned that Hisco Construction was to do the painting work on the Tuttle-White project, Neal Horne, the Business Manager of Local 164, attempted to have Epley obtain his painting employees for Hisco Construction through the Local 164 hiring hall. During the Tuttle-White project, Hisco Construction did not request employees directly from the Local 164 hiring hall, and did not make any fringe benefit contributions on behalf of its painting employees to any of the funds established by Local 164, or in which Local 164 participated. After Local 164 was unsuccessful in persuading Hisco Construction to obtain its painting employees through the Local 164 hiring hall, charges were filed in a letter dated May 11, 1978, against James Epley d/b/a Epley Coatings protesting the use of non-union labor on the Tuttle-White job, and claiming that this was a violation of Article II, Section D of the agreement with Local 164.[1] A copy of this letter was delivered to Epley Coatings. Epley did not agree with the union position.

On May 24, 1978, pursuant to Article X, a Joint Trade Board meeting was held to hear and resolve this dispute. The Joint Trade Board consisted of three persons selected by the PDCA Contractors and three selected by Local 164. The Trade Board arrived at a decision finding that the use of Hisco Construction as a non-union employer by Epley on the Tuttle-White job violated the agreement between the parties. The Trade Board ruled that an audit would be requested to determine if fringe benefits were due for hours worked by Hisco

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[1] Article II, Section D provides as follows:

> Employer party hereto shall not use any corporate or other operating device for the purpose of violating his obligations under this agreement, it being expressly understood and agreed that excepting for the purpose herein expressed, nothing herein contained shall preclude any employee from lawfully participating or engaging in any venture, partnership or corporate business.

employees and that after the audit had been completed, the Trade Board would reconvene to establish any amounts determined to be due. Epley was furnished with a copy of the decision of the Trade Board by letter dated May 30, 1978. The decision and the accompanying letter both specifically advised Epley of the procedures to be followed to perfect an appeal. Epley was not notified of the hearing until the day it was held. He did not attend claiming that he was not given sufficient notice, nor did he appeal.

A new agreement was negotiated between the PDCA and Local 164, replacing their earlier one that had a stated expiration date of June 16, 1978. Epley refused to sign this new agreement. Epley continued, as he had done previously, to use Local 164 members to finish up the job on the OPS-Blount Island project and utilized employees obtained from Local 164 until August 4, 1978. Thereafter, Local 164 refused to furnish any more labor to finish Epley Coatings' work at Blount Island, because of Epley's refusal to sign the new agreement. Epley was then required to subcontract out the balance of the work needed to be done at OPS through W. E. Arnold and Scrogins Painting Contracting Company. The company finished the work using Local 164 supplied labor in the Fall of 1978.

Painting work on the Tuttle-White job was performed by employees of Epley d/b/a Hisco Construction from May, 1978 through October 18, 1978. On October 18, 1978 Hisco Construction was incorporated as a Florida corporation and became Hisco Construction, Inc., which purchased the net assets of Hisco Construction including the unfinished work on the Tuttle-White project. Epley became the sole stockholder and director of Hisco Construction, Inc., with he and his wife being the only officers of the company.

Local 164 had requested that Epley make available the books and records of both Epley Coatings and Hisco

Construction. Epley refused to permit the audit of both proprietorships and filing of this suit resulted. During the discovery phase of this litigation an audit for the relevant periods was performed on payroll records of Epley d/b/a Epley Coatings, Epley d/b/a Hisco Construction, and Hisco Construction, Inc.

The principal issue to be decided is whether the decision of the Joint Trade Board was rendered pursuant to an existing valid agreement between the parties.

In *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), the Supreme Court described the court's proper role in reviewing an arbitrator's interpretation of a collective bargaining agreement. Basically the courts are prohibited from reviewing the merits of an arbitration award, and are to judge the legitimacy of the award by determining whether it draws its essence from the collective bargaining agreement. "When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *Id.* at 597. The Fifth Circuit in *General Warehousemen and Helpers Local 767 v. Standard Brands, Inc.*, 597 F.2d 1282 (5th Cir. 1978), further delineated the controlling standards for the judicial scrutiny of arbitration awards. An arbitration award is only enforceable if: (1) there is an agreement to arbitrate and the parties are covered by that agreement; (2) the award draws its essence from the agreement and does not exceed the scope of the issues presented to the arbitrator; and (3) the award is not repugnant to the National Labor Relations Act. The inquiry here is basically confined to ascertaining whether the arbitrator was acting pursuant to valid and existing agreement. If so, the court must defer to the arbitrator's decision on the merits of the dispute.

The May 1, 1974 agreement was the first entered into between the parties and was a prehire agreement within the meaning of the National Labor Relations Act § 8(f),

29 U.S.C. § 158(f). The agreement was signed without any election among the employees working on Blount Island to determine whether or not they wanted to be represented by the Union. Ordinarily, this would be an unfair labor practice under the NLRA because it would deny the employees the freedom to choose whether or not they wished to be represented for purposes of collective bargaining. 29 U.S.C. §§ 157, 158(a)(1), 158(a)(2). However, section 8(f) of the NLRA legitimatizes this type of a working agreement in the construction industry because of the unique nature of the industry. The occasional nature and short duration of employment characterize the construction industry. These circumstances made it difficult for employees desiring union representation to apply the normal election procedures or otherwise demonstrate majority support for a union. Construction industry employers ueed to ascertain their labor costs before beginning a project so that they can submit a complete bid for the construction job. Additionally, employers require advance assurance that they will be able to obtain a steady supply of skilled labor upon short notice. S. Rep. No. 187, 86th Cong., 1st Sess. 28, *reprinted in* [1959] *U.S. Code Cong. & Admin. News*, pp. 2318, 2344-45; H.R. Rep. No. 741, 86th Cong. 1st Sess. 19, *reprinted in* [1959] *U.S. Code Cong. & Admin. News*, pp. 2424, 2442. Section 8(f) was passed to remedy these problems. It allows the employer and the union to enter into agreement before the union achieves majority status. An employer is thus able to plan his costs in advance and rely on the union hiring hall to secure labor. In turn, a worker is able to rely on the union as a central point in the market to which he can apply for work. Thus, section 8(f) by securing an exemption from the representation provisions of section 9 of the Act, 29 U.S.C. § 159, allows an employer and a union to establish an initial beneficial relationship before the union commands majority support. *N.L.R.B. v. Ha-*

berman Construction Company, 618 F.2d 288, 304-05 (5th Cir. 1980) (rehearing granted en banc July 15, 1980).

In the event the union later obtains majority support, the prehire agreement attains the status of a collective bargaining agreement executed by the employer with a union representing a majority of the employees in the appropriate bargaining unit. *N.L.R.B. v. Local 103, International Association of Bridge Workers* (Higdon Construction Co.), 434 U.S. 335, 98 S.Ct. 651 (1978). Concomitant with obtaining majority support, the union is entitled to a rebuttable presumption of continued majority status. *Higdon Construction Co., supra*; *Brooks v. N.L.R.B.*, 348 U.S. 96, 75 S.Ct. 176 (1954).

The parties initial agreement, as a section 8(f) prehire agreement, was transformed into a collective bargaining agreement when the parties entered into their second agreement on or about May 1, 1976, the effective date of the agreement. Section 8(f) was designed to accommodate the initial attempt by the union and the employer in the construction industry to commence a bargaining relationship. The doctrine that a 8(f) contract may be validly cancelled during its term in absence of specific proof of the union's majority representation is only applicable to initial contracts and not to succeeding ones. *William Enterprises, Inc.*, 212 N.L.R.B. 880 (1974), *enforced*, 89 L.R.R.M. 2190 (4th Cir. 1975); *Bricklayers & Masons Local 3*, 162 N.L.R.B. 476 (1966), *enforced*, 405 F.2d 469 (9th Cir. 1968). The parties had signed their first agreement prior to work commencing at Blount Island which was in December, 1975. Thus, for a period of approximately six months, the parties operated under their first agreement. This period of time is tacit support for the designation of Local 164 by the employees as their collective bargaining representative. There was sufficient time for the employees to voice their opposition to Local 164 or to voice their support for another bargain-

ing representative, but no evidence was presented to this effect. *N.L.R.B. v. Irvin*, 475 F.2d 1265 (3rd Cir. 1973). Thus the parties' second agreement is a valid collective bargaining agreement with a rebuttable presumption of majority representation by Local 164. *See*, King & La-Vaute, *Current Trends in Construction Industry Labor Relations—The Double Breasted Contractor and the Prehire Contract*, 29 SYRACUSE L.REV., 901 (1978).

The defendant raises various arguments contending that no valid agreement exists as to the Tuttle-White project.

Defendant Epley appears to argue that certain agreements terminated either before the Tuttle-White project was started or before it was completed and that this termination was effected either by the agreements own expiration clauses or by Epley's refusal to sign certain agreements. An examination of the appropriate contract provisions clearly reveals that defendant's arguments are untenable.

Article XII(B) of the second agreement which both parties signed provides:

> (B) This Agreement shall be in effect from May 1, 1976, until April 30, 1978, or until a written agreement has been made and entered into between the Union and the Jacksonville Chapter Painting and Decorating Contractors of America, whichever event occurs first.
>
> In the event a written agreement is made and entered into between the Union and the Jacksonville Chapter Painting and Decorating Contractors of America, the Union and Employer agrees that this Agreement shall be cancelled and further agree that the Union and Employer will become signatory to the said agreement made and entered into between the Union and

the Jacksonville Chapter Painting and Decorating Contractors of America.

This Agreement shall continue in effect from year to year unless modified or cancelled as provided herein.

The defendant by signing the second agreement agreed to be bound by any future agreement entered into by the Union and PDCA. Therefore, the defendant is bound by the June 17, 1976 agreement entered into by the Union and PDCA. This result is the same notwithstanding the fact that defendant is not a member of the PDCA and has not assigned any bargaining right to it. The May 1, 1976 agreement does not condition the defendant's obligation under future agreements on his membership in the PDCA or on his signing of those agreements. *See, Ted Hicks and Associates*, 232 N.L.R.B. 1131 *enforced*, 572 F.2d 1024 (5th Cir. 1978). The PDCA-Union agreement of June 17, 1976 also provides in paragraph b of Article XII that after June 16, 1978, the agreement would "continue in in effect from year to year thereafter, unless notified or cancelled as hereinafter provided."

(c) Any party desiring modification of this agreement shall give written notice to the other party hereto no less than ninety (90) days prior to any annual expiration date.

(d) Any party by written notice to all other parties given not less than sixty (60) days prior to any anniversary date may terminate this contract.

Defendant's refusal to sign the new agreement between the PDCA and the Union does not terminate the earlier one. Paragraphs c and d provide the specific manner in which modification or termination of the agreement is to be accomplished. The defendant failed to comply with these provisions. The agreement is still viable since compliance with the termination provisions found in the agreement is required before the agreement may be lawfully terminated. *N.L.R.B. v. R.J. Smith Construction*

Co., 545 F.2d 187 (D.C. Cir. 1976). Even if Epley had effectively terminated the above agreement, he still would have a continuing duty to bargain absent lack of majority status by the Union. At contract expiration, an employer may not unilaterally alter, without bargaining to an impasse contractual terms which are the subject of bargaining. This result follows because such terms by operation of statute continue even after the contract embodying it has terminated. *Haberman Construction Co.*, 618 F.2d at 302. Examples of contractual terms which survive contract expiration include wage and fringe benefits. *Id.* at 303.

Alternatively, the defendant asserts that any agreement entered into by the parties was to be restricted in coverage to the Blount Island-OPS project and was to have no application to the work performed by Hisco on the Tuttle-White project. The parties contractual agreements are claimed to have been entered into as part of the master project agreement between the Northeast Florida Building and Construction Trades Council, including Local 164, the general contractor and various subcontractors who worked on the project at Blount Island. The purported intention of the signatory parties was to conduct the Blount Island project with union labor whereby all general contractors and their subcontractors would sign agreements with the various trade unions working on the project. However, the agreements entered into by the parties herein do not in any manner restrict their coverage to the Blount Island project.

The preamble of the agreement in effect when their substantive dispute arose, that being the PDCA-Union agreement of June 21, 1976, provides that it is "applicable to the jurisdiction as covered by Local Union #164." The jurisdiction of Local 164 is the greater Jacksonville area which encompasses the Tuttle-White project. No limitation is found restricting the agreement to the Blount Island project. Furthermore, Article XII(a) provides that:

> This Agreement comprises the entire agreement between the parties and no oral agreement can vary or alter the terms hereof.

This provision forecloses consideration of Epley's contention that he orally modified the scope of their agreement by his statements to Local 164. Article XII(c) describes the necessary procedures to effect modifications of the parties' agreement.

Another of defendant's contention is that the rebuttable presumption of majority status by the union has, in fact, been rebutted and therefore any agreement is unenforceable either as to the Tuttle-White project or as to the entire bargaining unit. This contention is predicated on the opinion of the Fifth Circuit in *Haberman Construction Co., supra.* The defendant argues that whether the test for determining majority status is based on the union membership of the bargaining unit comprising both relevant projects or whether the test is based on the union membership of the individual project (in this case, the Tuttle-White project,) defendant has rebutted the presumption under either test. Without ruling on the merit of this position, the defendant is precluded from utilizing it, because he cannot benefit from his own wrongful conduct.

The decision of the Joint Trade Board found in pertinent part that the formation of Hisco Construction as another proprietorship by Epley and the performance of work by Hisco at the Tuttle-White project without obtaining labor from the union hiring hall violated Article 2(d) of the applicable agreement. The Board's decision required that all labor "will be obtained in accordance with Article VII of the current working agreement." Article VII(a) as found in all applicable agreements provides:

> The Employer shall call upon the Union to furnish him with skilled workmen best suited to his needs. The Employer agrees that in making such request

> he will give the Union forty-eight (48) hours notice of his labor requirements.

Under these circumstances, the defendant now attempts to use the very violation to show that he has rebutted the presumption of majority status of the Union. In *Frank Bros. Co. v. N.L.R.B.*, 321 U.S. 702, 64 S.Ct. 817 (1944), the Supreme Court approved the N.L.R.B. order which directed an employer to bargain collectively with a union which had lost its majority support after the employer had wrongfully refused to bargain with it. The underlying reasons for the union's loss of majority support were attributable to the employer's conduct. "[T]he unlawful refusal of an employer to bargain collectively with its employees' chosen representatives disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions." 64 S.Ct. at 818. The employer's contention was that it no longer had to bargain with the union because the union had lost majority status.

The Court found the contention unconvincing, for to allow such contention to prevail "would result in permitting employers to profit from their own wrongful refusal to bargain." *Id.* Likewise in the present case, Epley after having been found to have violated the agreement by, in part, refusing to secure union labor through the Union hiring hall, cannot now be heard to argue that because he hired non-union workers, this proves that the union did not have majority status. This would permit Epley to benefit from the very violation sought to be redressed.

Finally, defendant contends that the notice of the Joint Trade Board meeting was insufficient. However, this position is unpersuasive since failure to appeal either the alleged inadequate notice or the decision that was rendered, effectively waived Defendant's objections thereto.

The Court finds that the decision of the Joint Trade Board dated May 24, 1978 is based upon a valid existing agreement between the parties hereto, is within the is-

sues properly considered by the Board, is inconsistent with the National Labor Relations Act and must therefore be upheld. It is therefore

ORDERED:

1. That the determination of the Joint Trade Board dated May 24, 1978 regarding liability of the Defendant for Fringe Benefit Fund payments, audit costs, costs of this action and attorneys fees is upheld and confirmed.

2. That further proceedings to determine the amounts of such payments, costs and attorneys fees shall be conducted by the Joint Trade Board pursuant to Article X of the contract, the rules and regulations of the Joint Trade Board, and its order of May 24, 1978.

3. That this Court reserves jurisdiction of this cause pending compliance by the Defendant with the final decision of the Joint Trade Board on the issue of damages due Plaintiff of the Defendant.

4. The Defendant shall comply with the final decision of the Joint Trade Board within sixty (60) days from such decision and Plaintiff shall forthwith report to the Court the facts of such compliance or non-compliance.

DONE AND ORDERED at Jacksonville, Florida this 25th day of February, 1981.

/s/ William J. Castagna
WILLIAM J. CASTAGNA
United States District Judge

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APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 78-532-Civ-J-WC

PAINTERS LOCAL UNION NO. 164 OF THE BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, *et al.*,
Plaintiffs,

vs.

JAMES L. EPLEY, ETC.,
Defendants.

[Filed Jan. 23, 1984]

FINAL JUDGMENT

Pursuant to the Opinion and Order filed February 26, 1981 as amended by Order filed May 12, 1981 and the decision of the joint trade board attached to the Certificate of Filing Decision of Joint Trade Board dated February 2, 1983, it is

ADJUDGED that:

1. Final Judgment is entered in favor of Plaintiffs, Painters Local Union No. 164 of the Brotherhood of Painters, Decorators and Paperhangers of America and Trustees of the Painters, Decorators and Paperhangers of America Local 164 Health and Welfare Plan, and against the Defendants, James L. Epley, individually and doing business as Epley Coatings and Hisco, in the

amount of $16,373.29, fringe benefits; $2867.00, audit fees; $10,800.00, attorney fees and costs, for a total sum of $30,040.29 plus interest at the rate of 9.87% from date until paid, for all of which let execution issue.

DONE AND ORDERED at Tampa, Florida this 23rd day of January, 1984.

/s/ William J. Castagna
WILLIAM J. CASTAGNA
United States District Judge

Copies to:

Counsel of Record

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-444

PAINTERS LOCAL UNION NO. 164 OF THE BROTHERHOOD OF PAINTERS

v.

JAMES L. EPLEY, ETC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of cvertiorari in the above-entitled cause be, and the same is hereby, extended to and including January 15, 1986.

/s/ Lewis F. Powell, Jr.
LEWIS F. POWELL, JR.
Associate Justice of the Supreme Court of the United States

Dated this 6th
day of December, 1985.

Supreme Court, U.S.
FILED
MAR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1191

In The

Supreme Court of the United States

October Term, 1985

PAINTERS LOCAL UNION NO. 164 OF THE BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AND TRUSTEES OF THE PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA LOCAL NO. 164 HEALTH & WELFARE PLAN,

Petitioners,

v.

JAMES L. EPLEY, an individual and doing business as EPLEY COATINGS and HISCO CONSTRUCTION,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Attorneys for Respondents

14 pp

RESTATEMENT OF QUESTIONS PRESENTED

1. May a construction industry employer, who hires on a project-by-project basis, repudiate a pre-hire agreement, authorized by §8(f) of the National Labor Relations Act, at any time prior to the Union's attainment of majority status in the appropriate unit?

(Restatement of Questions 1, 2 and 3 in the Petition for Writ of Certiorari.)

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In The

Supreme Court of the United States

October Term, 1985

PAINTERS LOCAL UNION NO. 164 OF THE BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AND TRUSTEES OF THE PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA LOCAL NO. 164 HEALTH & WELFARE PLAN,

Petitioners,

v.

JAMES L. EPLEY, an individual and doing business as EPLEY COATINGS and HISCO CONSTRUCTION,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 764 F.2d 1509. (Pet. App. 1A-9A) The Opinion and Order of the United States District Court is not reported. (Pet. App. 12A-25A)

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act,

29 U.S.C. 151 *et. seq.*, are set forth at Pet. 2. The National Labor Relations Act will hereinafter be referred to as "the Act".

STATEMENT OF THE CASE

Statement of Facts

Respondents, JAMES L. EPLEY, d/b/a EPLEY COATINGS and HISCO CONSTRUCTION (hereinafter referred to as "Epley") will rely upon the Statement of Facts as set forth in the Opinion of the Court of Appeals for the Eleventh Circuit reported at 764 F.2d 1509 and included in the Appendix to the Petition at p. 1A. Additionally, Epley wishes to correct some of the facts as recited in the Petition.

Epley informed Painters Local Union No. 164 ("the Union"), prior to undertaking the Tuttle-White construction project, that the Blount Island job would be both the first and last union job undertaken by Epley. There was no dispute that Epley repudiated the pre-hire contract prior to the time any financial obligations under that agreement arose on the Tuttle-White job. Both the Union's business agent and Epley testified consistently in the District Court that Epley verbally communicated his intention to repudiate the pre-hire agreement, and, by his subsequent conduct, also repudiated the agreement. See Appendix to the Petition at Page 5A; 764 F.2d at p. 1511-12. After telling the Union's business agent that all future jobs would be "non-union", Epley refused thereafter to sign any new project agreement with the Union after the initial agreements had expired. Pet. App. 4A. He utilized non-union labor exclusively on the Tuttle-White job which commenced in May of 1978. When confronted by the Union's business agent and a picket line protesting the use of non-union labor at the Tuttle-White jobsite, Epley reaffirmed that he no longer intended to be bound by the pre-hire agreement with the Union. Pet. App. 5A.

Repudiation was, thus, not a disputed factual issue in the District Court. Neither was the Union's lack of majority

status on the Tuttle-White job. The parties stipulated the Union never represented a majority of Epley's employees on the Tuttle-White job. P.App. 9A; 764 F.2d at p. 1514. Epley was a project-by-project employer and had no stable work force that he utilized on any particular project.

Based upon uncontradicted evidence regarding repudiation prior to accrual of any financial obligations on the Tuttle-White project, the Union's lack of majority status on the Tuttle-White project and Epley's status as a "project-by-project employer", the District Court decided the case on an erroneous application of law. The District Court concluded that once an employer signed a second successive pre-hire agreement, this automatically became a full-fledged collective bargaining agreement and could *not* be repudiated under *any* circumstances. Epley's undisputed repudiation of the agreement was held to be a nullity by the District Court. P.App. 19A-22A.

The Court of Appeals reversed the District Court's decision solely because of the District Court's erroneous legal conclusion holding Epley liable for fringe benefits accruing *after* repudiation on a construction project (Tuttle-White) where the Union did not represent a majority of the employees. P.App. 3A,6A,9A; 764 F.2d at p. 1512-13.

ARGUMENT

There is nothing novel about the decision of the Court of Appeals. The decision is consistent with, and expressly predicated upon, this Court's decisions regarding the right of both employers and unions to repudiate pre-hire agreements prior to the Union's attainment of majority status in an appropriate unit. *Jim McNeff, Inc. v. Todd,* 461 U.S. 260, 103 S.Ct. 1753, 75 L.Ed 2d 830 (1983); Pet. App. 6A. The decision of the Court of Appeals below did not plow any new ground in the pre-hire agreement arena. It is in accord with decisions from other Courts of Appeals. The decision of the Court of Appeals is also in harmony with long-standing

precedent of the NLRB. There are no compeling considerations present here which would warrant the Court's exercise of its discretionary review power.

1. In *McNeff v. Todd* this Court held that a Section 8(f) pre-hire agreement can be enforced for obligations accrued *prior to* repudiation by a minority union in an action brought pursuant to § 301 of the Act. The Court, likewise, recognized that a Section 8(f) pre-hire agreement is subject to repudiation by either party until the union establishes majority status in the appropriate unit.

Prior to *McNeff v. Todd,* the Court found in *NLRB v. Ironworkers Local 103* (Higdon), 434 U.S. 335, 98 S.Ct. 651, 54 L.Ed. 2d 586 (1978), as did the Court of Appeals below, that Section 8(f) pre-hire agreements do not automatically accord a union majority status at every jobsite simply because successive agreements are entered into between the employer and the union. There the Court noted that:

> "The proviso exposing unions with pre-hire agreements to inquiry into their majority standing by elections under § 9(c) led the Board to its decision in *R.J.Smith:* An employer does not commit an unfair labor practice under § 8(a)(5) when he refuses to honor the contract and bargain with the union and the union fails to establish in the unfair labor practice proceeding that it has ever had majority support. As viewed by the Board, a 'pre-hire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship'. *Ruttman Construction Co.,* 191 NLRB 701,702 (1971). The employer's duty to bargain and honor the contract is contingent on the union's attaining majority support at the various construction sites. In *NLRB v. Irvin,* 475 F.2d 1265 (CA3 1973), for example, the pre-hire contract was deemed binding on those projects at which the union had secured a majority but not with

> respect to those projects not yet begun before the union had terminated the contract . . ." 434 U.S. at 345-46;

The Court of Appeals, just as this Court had in *NLRB v. Ironworkers Local 103,* concluded that the Union must establish its majority status at each worksite where the employer is a project-by-project employer. 434 U.S. at 344-46.

In *McNeff,* this Court left open the question of what evidence would be sufficient to constitute repudiation of a pre-hire agreement. There was no necessity for reaching that issue in *McNeff,* just as there is no necessity for reaching that issue here. In *McNeff,* there was *no* evidence of repudiation prior to accrual of fringe benefit obligations enforced against the employer. There was, thus, no evidence to resolve on the issue of repudiation. The Court of Appeals below was faced with uncontradicted evidence of repudiation. Epley repudiated the pre-hire agreement prior to the time any fringe benefit obligations accrued on the Tuttle-White project. Both the Union and Epley agreed that notice of repudiation had been given. See P.App. 5A; 764 F.2d at 1512.

2. The decision of the Court of Appeals is also consistent with decisions rendered by other Courts of Appeals subsequent to this Court's decision in *McNeff.* See, *e.g., Ironworkers Local 103 v. Higdon Construction Co., Inc.,* 739 F.2d 280 (7th Cir. 1984); *Contractors, Lab., Team. & Eng. v. Harkins Const.,* 733 F.2d 1321 (8th Cir. 1984). Also see *Washington Area Carpenters' v. Overhead Door Co.,* 681 F.2d 1 (D.C. Cir. 1982); *NLRB v. Haberman Const. Co.,* 641 F.2d 351 (5th Cir. *En Banc* 1981).

All of the Courts of Appeals are in harmony with the notion that a §8(f) agreement may be repudiated by a construction industry employer at any time prior to the union's attainment of majority status in the appropriate unit. Whether or not

notice of repudiation has sufficiently been given is a question of fact which is not in dispute here since both the Union and Epley agree that notice of repudiation had been given. *Cf. Operating Eng. Pen. Trust v. Beck Eng. & Surveying,* 746 F.2d 557 (9th Cir. 1984).

3. Not only is the decision of the Court of Appeals consistent with prior decisions of this Court, it is also consistent with long-standing interpretation and application of Section 8(f) of the Act by the National Labor Relations Board. See *e.g., Acme Marble & Granite Co., Inc. and Laborers Local Union 1290,* 271 NLRB No. 147, 1984-85 CCH NLRB para. 16,676 (1984); *D'Angelo & Khan, Inc. and Bricklayers, etc. Local No. 43,* 248 NLRB No. 62, 1980 CCH NLRB para. 16,845 (1980); *Dee Cee Floor Coverings, Inc. and Resilient Floor & Decorative Covering Workers Local 1179,* 232 NLRB No. 72, 1977-78 CCH NLRB para. 18,658 (1977). The Board has also recognized that a construction industry employer may repudiate a pre-hire agreement without violating Section 8(a)(5) of the Act as long as the Union has not achieved majority status at succeeding jobsites undertaken after the original pre-hire agreement was executed. *Ibid.*

4. Petitioner mistakenly attempts to equate pre-hire agreements to which a minority union is a party with full-fledged collective bargaining agreements in a context where the Union enjoys majority support in an appropriate unit. See *Howard Johnson Co. v. Hotel Employees,* 417 U.S. 249, 84 S.Ct. 2236, 41 L.Ed. 2d 46 (1974). If a pre-hire agreement, as the Union suggests, can only be terminated in writing, then pre-hire agreements could be drafted to preclude termination, even where the Union never attained majority status in the appropriate unit. For example, a pre-hire agreement could state that it could only be terminated at the end of three years in writing. Permitting such a result would fly in the face of freedom to void pre-hire agreements by notifying the other party of intent to do so, an essential part

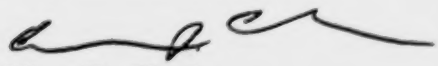
of national labor policy. *NLRB v. Ironworkers Local 103 (Higdon), supra; McNeff v. Todd, supra.* Also see *Painters District Council No. 3 Pen. Fund v. Johnson,* 566 F.Supp. 592,598 (W.D. Mo. 1983); *Cable Guide Railing Construction v. Intern. Assn., etc.,* 543 F.Supp. 405,407 (W.D. Pa. 1982). A pre-hire agreement could be drafted so that an employer would automatically be bound to successor agreements from the time the initial agreement was signed until infinity. This would surely undermine freedom of choice, one of the most important precepts of our national labor policy. See § 9 of the Act, 29 USC § 159.

5. Petitioner erroneously assumes that a pre-hire agreement may be enforced as to contractual obligations accruing *after* repudiation. This assumption apparently is caused by mischaracterizing Epley's *repudiation* as a "breach" of contract. Section 8(f) is an exception to the general rule which would ordinarily prohibit an employer and minority union from entering into a collective bargaining agreement without permitting employees in the appropriate unit to express their freedom of choice. *NLRB v. Ironworkers Local 103, supra.* Since Section 8(f) permits pre-hire agreements to be consummated between an employer and a minority union, the freedom to repudiate such agreements prior to the union's attainment of majority status in the appropriate unit is a necessary condition inherent in the relationship. *McNeff v. Todd, supra.* Repudiation is a right accorded *both* employers and unions.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing have been furnished to Frank E. Hamilton, Jr., Counsel of Record, Frank E. Hamilton, III, Esquire, 2620 West Kennedy Boulevard, Tampa, Florida 33609, by U. S. mail, this 27th day of March, 1986.

Attorney